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No. 522

IN THE

Supreme Court of the United States

October Term, 1957

SEATRAIN LINES, INC.,
Appellant

v.

UNITED STATES OF AMERICA
INTERSTATE COMMERCE COMMISSION
PAN-ATLANTIC STEAMSHIP CORPORATION,
Appellees

On Appeal from the United States District Court for the District of Delaware

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM

S. S. EISEN
140 Cedar Street
New York, N.Y.

Of Counsel
RAOUL BERGER
1108 Sixteenth Street
Washington 6, D. C.

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We agree that the sole issue is whether the Interstate Commerce Commission

> "may grant an exemption under Sec. 303(e)(2) * * * without making *jurisdictional findings* that the exemption is consistent with and will effectuate the national transportation policy." P.A. Br. 3.[1] (emphasis supplied throughout)

See also U.S. Br. 3-4.

Significantly, neither Pan-Atlantic nor the government comment upon our detailed refutation in the Jurisdictional Statement of the district court's analysis but content themselves with quoting or paraphrasing its opinion.

[1] The Motion to Affirm of Pan-Atlantic S.S. Corp. is hereinafter cited as P.A.Br., that of the government as U.S. Br.

1) Pan-Atlantic sets out the conditions upon which an exemption may issue under 303(e)(2), and paraphrasing the court below, concludes that

> "If the Commission should grant or withhold an exemption based on considerations other than those specifically included in the section, clearly it would err. Whether or not the grant of an exemption under Section 303(e)(2) would accomplish the purposes of the national transportation policy is not one of the considerations set forth in the Act." P.A. Br. 6. See also U.S. Br. 6.

By such logic the Commission would also be absolved, for example, from giving effect to the NTP in granting certificates of convenience and necessity under Sec. 309(c), 49 U.S.C. Sec. 909(c), because that section is no less self-contained and also lays down its own special "considerations", namely, that

> "the Commission finds that the applicant is fit, willing and able properly to perform the service proposed * * * and that the proposed service * * * is or will be required by the present or future public convenience and necessity * * *."

Plainly the NTP is not "one of the considerations set forth in" Sec. 309(c). Yet, says the government, the NTP "is obviously applicable" to "certificates of public convenience and necessity". U.S. Br. 5. Why should the NTP word "all" be so "obviously applicable" in the one case and not in the other?

Apparently the distinction relied upon by appellees is that the Sec. 303(e)(2) power to grant exemptions is couched in terms of "*policy*", and both appellees argue that that "policy" overrides the policy of the NTP. U.S. Br.4-6; P.A.Br.4. But why must the categorical directive of 309(c)—that the Commission "shall" issue a certificate upon finding the above-mentioned "considerations"—yield to the NTP if the 303(e)(2) permissive expression of "policy" to grant rather than a directive to do so is to override the NTP? Manifestly that is absurd.

When Congress desired to insulate certain provisions from the remainder of the Act, it did not leave the matter to vague implications but did so in unmistakable terms, as in Sec. 303(e)(1), which authorizes the grant of an exemption "from the requirements of this part" "notwithstanding any [other] provision of this part".

Nor is appellees' position improved when the "policy" of 303(e)(2) is labelled "special" with the alleged consequence that it must therefore override the "general" policy of the NTP. U.S.Br. 6; P.A.Br.4. Only

> "where there is inconsistency between general and special provisions of an act, [do] the latter control." *United States* v. *Mattio*, 17 F. (2d) 879, 880.

And see *Callahan* v. *United States*, 122 F.(2d) 216, 217. Pan-Atlantic itself stated in its brief (p. 13) in the court below that

> "there is clearly no conflict or inconsistency between the provisions of Sec. 303(e)(2) and the national transportation policy."

This was likewise the government's position in the court below. See Jurisdictional Statement, p. 6. Were a conflict to be spelled out because 303(e)(2) lays down the particular "considerations" upon which an exemption may issue, then the "special" considerations which govern the issuance of certificates of convenience and necessity and the like would likewise conflict with the NTP. The resultant of such reasoning would be complete frustration of the Congressional intention that "all provisions" of the Act shall be governed by the NTP.

2) In citing *United States* v. *Louisiana*, 290 U.S. 70, 80, and *Ward Transport* v. *United States*, 125 F. Supp. 363, for the proposition that the Commission need not in certain circumstances make "detailed findings of fact", P.A.Br.6-7, Pan-Atlantic forgets that the issue is whether the Commission may grant the Sec. 303(e)(2) exemption "without making *jurisdictional* findings". P.A.Br.3.

We have never insisted upon "detailed findings of fact", i.e. of the "evidentiary facts", to which *Wards* adverts. We complain of the absence of a "basic" finding of "ultimate fact", a *jurisdictional* finding which responds to the mandate of the statute.

It may be noted that *Alabama Great Southern Railroad Co.* v. *United States*, 340 U.S. 216, which is cited in the *Ward* fragment quoted by Pan-Atlantic, (P.B. Br. 7), held that Sec. 14(1) of the Act, which was amended in 1906 to relieve the Commission of making findings of fact,

> "does not relieve the Commission of the duty to make the 'basic' or 'quasi-jurisdictional' findings essential to the statutory validity of an order." 340 U.S. at 228.

And Sec. 8(b) of the Administrative Procedure Act (5 U.S.C. Sec. 1007(b)), which requires "all" agency decisions to "include a statement of findings", is applicable to the Commission, *Atlanta & St. Andrews Bay Ry. Co.* v. *United States;* 104 F. Supp. 193, 200. Finally, there is no room for an "implied" finding, as in the *Ward* case, because the district court found that the Commission "expressly declined to consider" and "did not consider" the NTP. Appendix B (to our Juris. Statement) pp. 15A-16A.

3) Pan-Atlantic alleges that "appellant holds the same exemption that it now seeks to deny to Pan-Atlantic",[2]

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[2] The exemption was not in fact the "same". Seatrain obtained an exemption for the carriage of oil in side-tanks, which meant the carriage of 1200 tons on 4 of its smaller ships and 1700 tons on two others. The exempt traffic contributed just 9/10 of 1% of its total revenue, R.88, 98; whereas Pan-Atlantic could carry 14,000-15,000 tons of unregulated oil (i.e. about 10 times as much Seatrain) and 1200-1500 tons of regulated traffic on its northbound voyages, R.25., a difference which makes possible the use of unregulated oil rates to manipulate the rates for common carriage.

P.A.Br.2, and the government states that in the prior Seatrain case, Seatrain urged that its exemption was required by the NTP. U.S.Br.2-3. The grant of one certificate of convenience and necessity, or of one exemption, does not, of course, require the automatic grant of a string of others. Each successive application must stand upon its own bottom and in each case the Commission must comply with the law. Assume the existence in the record of facts upon which a finding in consonance with the NTP could be made, the failure of the Commission to consider and make a finding with respect to the NTP, Appendix B, p. 15 A, cannot be remedied by the courts, for they are not authorized

> "to make findings and substitute them for those of the Commission." *Colorado-Wyoming Gas Co.* v. *Federal Power Commission*, 324 U.S. 626, 634.

To the same effect, *Florida* v. *United States*, 282 U.S. 194, 215.

For the reasons set forth in our Jurisdictional Statement, we submit that the decision below is in error and that the judgment of the district court should be reversed.

Respectfully submitted,

S. S. Eisen
Attorney for Appellants

Of Counsel
Raoul Berger